

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

LIBERTY MUTUAL INSURANCE GROUP, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 PANELIZED STRUCTURES, INC., )  
 )  
 Defendant. )

Case No. 2:10-cv-01951-JCM-PAL

**ORDER**

(Mot for Protective Order - Dkt. #51)  
 (Reqst. for Pretrial Conf. - Dkt. #57)

The court conducted a hearing on Plaintiff Liberty Mutual's Motion for Protective Order (Dkt. #51), and Defendant/Counterclaimant/Third Party Plaintiff Panelized Structures, Inc.'s ("PSI") Request for a Pretrial Conference (Dkt. #57) on September 26, 2011. Elizabeth Foley appeared on behalf of the Plaintiff. Eugene Wait appeared on behalf of Defendant PSI, and Chris Albright appeared on behalf of Third Party Defendant Arizona Labor Force, Inc.

**I. Motion for Protective Order (Dkt. #51)**

Plaintiff's Motion for Protective Order (Dkt. #51) seeks a protective order precluding the deposition of a Rule 30(b)(6) deposition from going forward "on short notice." Counsel for Defendant served counsel for Plaintiff with a Rule 30(b)(6) deposition notice on September 1, 2011, for a deposition scheduled September 13, 2011. Counsel for Plaintiff asserts that Rule 32(a)(5)(A) provides that deposition taken on less than fourteen days notice must not be used against a party who moves for a protective order. A protective order was sought because the deposition was set on thirteen days notice, and most of the information had already been propounded by interrogatories. Plaintiff argues interrogatories are a better discovery method to obtain the information sought, and that to comply with the Rule 30(b)(6) notice would have required Liberty Mutual to send persons most knowledgeable from

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1 all over the country to Las Vegas to answer one question. Additionally, counsel for Plaintiff argues  
2 there is a “harassing undertone” to the deposition notice.

3 Defendant filed a Certification in Support of “Emergency Request for Judicial Assistance” in  
4 Opposition to the Motion for Protective Order (Dkt. #53). The Defendant argues that a Rule 30(b)(6)  
5 deposition was noticed for September 13, 2011, at 10:00 a.m., in Las Vegas because Defendant has  
6 been unable to confirm the true name of the “Liberty Mutual” entity which issued a worker’s  
7 compensation insurance policy at issue in this case. Counsel for Defendant indicates he attempted to  
8 informally arrange for initial deposition discovery with counsel for Plaintiff, to clarify the entities and  
9 witnesses with knowledge of discoverable facts relevant to this case. However, counsel for Liberty  
10 Mutual refused to discuss or agree to a Rule 30(b)(6) deposition for any purpose. Counsel for  
11 Defendant indicates that counsel for Liberty Mutual, Elizabeth Foley, advised him that any attempt to  
12 schedule a Rule 30(b)(6) deposition would be opposed by a motion for protective order. Under these  
13 circumstances, on August 30, 2011, he served a notice of taking deposition of Plaintiff Liberty Mutual  
14 pursuant to Rule 30(b)(6) giving thirteen days notice of the deposition. Nine specific areas of inquiry  
15 were provided in the notice. Counsel for Liberty Mutual did not call opposing counsel to discuss the  
16 notice or request that it be rescheduled. Rather, after waiting eight days, the motion for protective order  
17 was filed. Liberty Mutual made no attempt to resolve this discovery dispute before filing the motion.

18 Counsel for Defendant also points out that the motion for protective order is not designated as  
19 an emergency motion as required by LR 7-5(d), does not set forth any ground for the motion other than  
20 its short notice, does not claim that thirteen days notice is unreasonable, and provides no legal ground  
21 for the relief requested.

22 On September 9, 2011, counsel for Defendant, Eugene Wait, consulted with Elizabeth Foley by  
23 telephone in a sincere effort to resolve this dispute without the court’s intervention. Mr. Wait’s  
24 certification represents that he asked Ms. Foley if she wished to move the deposition to a later date;  
25 however, Ms. Foley refused to allow a Rule 30(b)(6) deposition of her client to go forward at any time  
26 and threatened to file a motion for protective order. Mr. Wait states he explained that the purpose of  
27 the deposition was to obtain verbal information to initiate discovery. The parties discussed this dispute  
28 for approximately twenty-four minutes before “Elizabeth Foley disconnected the telephones.”

1 Plaintiff replies that Defendant refused to vacate the September 13, 2011 deposition, despite the  
2 fact that Plaintiff provided the answer to several areas of inquiry telephonically on September 9, 2011,  
3 and in interrogatories served on September 12, 2011. Because no representative from Liberty Mutual in  
4 Boston could travel to Nevada on short notice, Plaintiff produced the Las Vegas Liberty Mutual Person  
5 Most Knowledgeable for deposition. That person answered approximately fifty questions in a  
6 deposition that lasted approximately one hour. Since the deposition was taken, Plaintiff has filed a  
7 Motion to Strike (Dkt. #54) and another Motion to Remand (Dkt. #58). The motion to strike seeks to  
8 strike Defendant's proposed pleading filed August 29, 2011, after the deadline for filing motions to  
9 amend the pleadings.

10 Plaintiff argues that "the bottom line" is that the September 13, 2011, deposition notice seeks  
11 discovery on issues outside the initial bad faith counterclaim on pleadings for which leave to amend has  
12 not been granted. Additionally, the deposition notice would have required Boston employees of Liberty  
13 Mutual to fly to Las Vegas on short notice to answer questions concerning why they authorized a 2006  
14 subrogation action. Plaintiff argues that there are serious substantive law issues which require  
15 resolution prior to re-noticing any Rule 30(b)(6) deposition notices. Specifically, Liberty Mutual argues  
16 that PSI is using its bad faith counterclaim to seek discovery concerning the state court subrogation  
17 action, that the Defendant is seeking discovery outside the statute of limitations applicable to their  
18 counterclaim, and that the court should not allow discovery on the "wrongful subrogation" counterclaim  
19 filed without leave of court after the expiration of the deadline for filing the motion to amend the  
20 pleadings. The reply argues that the court should limit discovery on the counterclaim filed August 4,  
21 2011, and that the court should not allow Defendant to issue a Rule 30(b)(6) deposition notice on short  
22 notice requiring a lawyer from Boston to testify about proprietary corporate information.

### 23 DISCUSSION

24 Fed. R. Civ. P. 26(c) permits a party to file a motion for a protective order. It provides in  
25 pertinent part: "The motion must include a certification that the movant has in good faith conferred or  
26 attempted to confer with the affected parties in an effort to resolve the dispute without court action."

27 *Id.*

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1 Local Rule 26-7(b) also provides:

2 Discovery motions will not be considered unless a statement of moving  
3 counsel is attached thereto certifying that, after personal consultation and  
4 sincere effort to do so, counsel have been unable to resolve the matter  
without court intervention.

5 Fed. R. Civ. P. 26(c) and Local Rule 26-7(b) serve several important purposes. First, the parties  
6 are required to meet and confer “to lessen the burden on the court and reduce the unnecessary  
7 expenditure of resources by litigants, through promotion of informal, extra-judicial resolution of  
8 discovery disputes.” *Nevada Power v. Monsanto*, 151 F.R.D. 118, 120 (D. Nev. 1993). Second, the  
9 meet-and-confer obligations “promote a frank exchange between counsel to resolve issues by agreement  
10 or to at least narrow and focus the matters in controversy before judicial resolution is sought”. *Id.* For  
11 the meet-and-confer obligations to serve their purpose, it is essential “that parties treat the informal  
12 negotiation process as a substitute for, and not simply a formal prerequisite to, judicial review of  
13 discovery disputes.” *Id.* To accomplish this requirement,

14 [t]he parties must present to each other the merits of their respective  
15 positions with the same candor, specificity, and support during informal  
16 negotiations as during the briefing of discovery motions. Only after all  
the cards have been laid on the table, and a party has meaningfully  
assessed the relative strengths and weaknesses of its position in light of  
all available information, can there be “a sincere effort” to resolve the  
matter.

17 *Id.* Judicial intervention should only occur when either informal negotiations have reached an impasse  
18 on the substantive issues in dispute, or one party has acted in bad faith by either refusing to negotiate or  
19 provide specific support for its claims. *Id.*

20 The court should not consider a discovery unless the moving party provides a certification of  
21 counsel which “accurately and specifically convey to the court who, where, how, and when the  
22 respective parties attempted to personally resolve the discovery dispute.” *Shufflemaster, Inc. v.*  
23 *Progressive Games, Inc.*, 170 F.R.D. 166, 170 (D. Nev. 1996). Additionally, the moving party must  
24 actually perform the obligation to confer or attempt to confer in good faith to resolve the discovery  
25 dispute without court intervention. *Id.* To accomplish the underlying policy of Local Rule 26-7(b) and  
26 Fed. R. Civ. P. 26(c), the moving party must include more than a cursory statement that counsel have  
27 been “unable to resolve the matter” and “must adequately set forth in the motion essential facts  
28

1 sufficient to enable the court to pass a preliminary judgment on the adequacy and sincerity of the good  
2 faith conferment between the parties.” *Id.* at 171. A good faith attempt to resolve the discovery dispute  
3 without court intervention involves more than “the perfunctory parroting of statutory language on the  
4 certificate to secure court intervention,” and requires “a genuine attempt to resolve the discovery  
5 dispute through non-judicial means.” *Id.*

6 Plaintiff’s motion for protective order contains a single statement of counsel that “I hereby  
7 certify that after personal consultation and a sincere effort to resolve this dispute, counsel have been  
8 unable to do so without Court action.” This statement consists, at best, of a perfunctory parroting of the  
9 requirement of LR 26-7(b) and does not comport with the Plaintiff’s meet and confer obligations as  
10 outlined in *Nevada Power v. Monsanto and Shufflemaster, Inc. v. Progressive Games*. Additionally,  
11 Plaintiff’s reply brief asserts arguments concerning the permissible scope of discovery not raised in the  
12 initial motion which is improper. Accordingly, the motion is denied.

## 13 **II. Request for Pretrial Conference (Dkt. #57)**

14 Defendant’s request for a pretrial conference outlined a partial procedural history of this case  
15 and stated counsel’s “firm conviction that this case requires a Rule 16 pretrial conference on an urgent  
16 basis.” The request did not state what counsel for Defendant was requesting to be discussed at a Rule  
17 16 conference. However, the court set the matter for hearing at the same time as the hearing on the  
18 motion for protective order. On Friday, September 23, 2011, at 5:32 p.m., counsel for Defendant filed a  
19 pretrial memorandum with attachments, which the court did not realize had been filed before the  
20 hearing. The pretrial memorandum outlined matters counsel for Defendant requested that the court  
21 address at a Rule 16 pretrial conference.

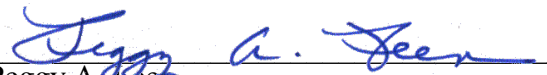
22 During the hearing, counsel for Defendant indicated that counsel for Plaintiff had not responded  
23 to letter requests to resolve outstanding discovery disputes, and was refusing to cooperate in providing  
24 substantive discovery responses. Counsel for Plaintiff indicated that she had received counsel for  
25 Defendant’s most recent letter on Friday, September 23, 2011, and had not had an opportunity to  
26 respond to it. The court directed counsel to meet and confer in a good-faith effort to discuss and narrow  
27 their discovery disputes without court intervention. Given the amount of time that has elapsed without  
28 any significant progress in pursuing discovery, the court will require the parties to meet and confer and

1 submit a joint status report in approximately two weeks. The court will set this matter for a status and  
2 dispute resolution conference, and resolve any outstanding discovery disputes without the need for  
3 formal briefing.

4 **IT IS ORDERED** that:

- 5 1. Plaintiff's Motion for Protective Order (Dkt. #51) is **DENIED**.
- 6 2. Defendant's Request for a Pretrial Conference (Dkt. #57) is **GRANTED**.
- 7 3. The parties shall meet and confer in a good-faith effort to resolve any outstanding  
8 discovery disputes. The parties shall have until **4:00 p.m., October 12, 2011**, to file a  
9 Joint Status Report. The Joint Status Report shall outline the parties' discovery disputes,  
10 and their respective positions regarding those disputes with sufficient specificity to  
11 enable the court to decide the matter without the necessity of formal briefing. The joint  
12 status report shall also address the specifics of the parties' efforts to resolve their  
13 disputes without the court's intervention as required by LR 26-7(b), *Nevada Power v.*  
14 *Monsanto and Shufflemaster, Inc. v. Progressive Games*. The parties' Joint Status  
15 Report shall also address any request for relief from the court's Discovery Plan and  
16 Scheduling Order deadlines.
- 17 4. A status and dispute resolution conference is scheduled for **October 18, 2011, at 9:30**  
18 **a.m.** Counsel may appear telephonically. Any counsel who wishes to appear  
19 telephonically shall notify the undersigned's Courtroom Administrator, Jeff Miller, at  
20 (702) 464-5420, and provide a number at which he or she can be reached no later than  
21 **12:00 p.m., Monday October 17, 2011.**

22 Dated this 26th day of September, 2011.

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24   
25 Peggy A. Lear  
26 United States Magistrate Judge  
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